APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

Civil Action No. 3092

United States of America, Plaintiff

State of Georgia, Plaintiff-Intervenor

v.

Herman Diamond, Defendant

O R D E R

The United States brought this action for preliminary and permanent injunction against Herman Diamond, pursuant to 33 U.S.C. SS 403 and 407, in connection with an allegedly unauthorized fill of marshland in Chatham County, Georgia. The State of Georgia intervened in the action on April 7, 1973, and sought a permanent injunction against further filling or altering the coastal marshlands of the State. Both the United States and the State of Georgia seek mandatory relief in the way of removal of the fill material placed by defendant in the marsh area involved.

On April 5, 1973, this Court issued a Temporary Restraining Order in connection with the depositing or dumping by defendant of refuse of any kind in the marshlands

along Richardson Creek. This Order expired after ten days but has been kept in effect by oral direction of the Court at at least two of the several evidentiary hearings in the case. My notes and the records of the Court reflect that such hearings were held during 1973 on May 28th, August 10th, August 29th-30th, September 4th and November 8th.

On June 14, 1973, defendant filed with the Corps of Engineers an application for an After-the-Fact Permit in regard to the fill. The application has been pending since that time and until a recent date. Mr. Diamond who appears as his own counsel has on at least two occasions urged that this Court is not empowered to grant mandatory injunctive relief in view of the fact that the administrative remedies in connection with his After-the-Fact Permit had not been acted upon by the Corps of Engineers. See United States v. Moretti, 478 F.2d 418, 430 (5th Cir.).[1]

On two occasions I urged the Corps of Engineers to expedite the handling of the permit in question.

Acting on matters affecting environment, ecology and wildlife is a time-consuming

---

[1] In Mr. Diamond's brief on November 19, 1973, he pointed out that he had filed an After-the-Fact Permit and that an official of the Corps of Engineers "has tried in every way to delay this permit".

process and involves consideration by numerous Government and state agencies. See 33 C.F.R. S 209.120(7) (d).[2]

On March 26, 1974, the Department of the Army found that the issuance of an After-the-Fact Permit to Mr. Diamond "for the proposed and existing fill will not be in the public interest, and therefore, the permit is hereby denied".

JUDGEMENT

April 17, 1974

This cause came on to be heard on the complaint of the United States of America, plaintiff, and the Court having heard oral evidence and admitted exhibits in open court and the Court having entered its findings of fact and conclusions of law on April 17, 1974, and it further appearing to the court that the defendant is committing acts and is about to commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this court, and that the said acts have caused irreparable injury and damage to the marshlands described in the complaint and that immediate and irreparable injury, loss or damage to the described area will result and that the activities described in the complaint have been con-

---

[2] Under the Environmental Policy Act the Army "must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors". Zabel v.Tabb, 430 F.2d 199, 213(5th Cir.);33 CFR S 209.120(f).

ducted by Herman Diamond without a permit from the Secretary of Army as required by 33 U.S.C. Section 403 and are in direct violation of the laws of the United States.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Herman Diamond, his servants, agents, employees, attorneys, successors, and assigns, and each of them, be permanently enjoined and restrained from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction operations on the area in dispute, bounded on the north by Richardson Creek and on the south by Oatland Island Road, Chatham County, Georgia.

No. 74-2273

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

April 24, 1975

OPINION

The United States and others instituted action to enjoin landowner from engaging in or permitting any fill or construction operations on certain salt water tidal marshlands. The United States District Court for the Southern District of Georgia, Alexander A. Lawrence, Chief Judge, granted the injunction and the landowner appealed. The Court of Appeals, Thornberry, Circuit Judge, held that request by Secretary of Army or his designate was not required to authorize institution of the suit; that grant of dock permit to landowner did not authorize landowner to engage in filling operations; that evidence sustained determination that creek which adjoined owner's land was navigable;

and that district court did not err in accepting testimony of government witness and in determining that the area filled would have been inundated at mean high water had it not been filled.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 74-2273

ON PETITION FOR REHEARING

(Filed May 29, 1975)

Before Bell, Thornberry and Gee, Circuit Judges.

PER CURIAM:

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

RIVERS & HARBORS ACT OF 1899

Title 33 U.S.C. Sec. 403

OBSTRUCTION OF NAVIGABLE WATERS GENERALLY; WHARVES; PIERS, ETC.; EXCAVATIONS AND FILLING IN.

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir,

breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. (Mar.3, 1899, ch.425, S. 10,30 Stat.1151.)

GENERAL PROVISIONS

Title 33 U.S.C. Sec. 1

REGULATIONS BY SECRETARY OF THE ARMY FOR NAVIGATION OF WATERS GENERALLY.

It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department. Such regulations shall be posted, in conspicuous and appropriate places, for the information of the public.

LAWS OF THE STATE OF GEORGIA

CHAPTER 85-13. WATER RIGHTS, NAVIGABLE STREAMS, ETC.

85-1308. (3636) Navigable tidewater defined.--A navigable tidewater is any tidewater, the sea, or any inlet thereof, or other bed of water where the tide regularly ebbs and flows, which is in fact used for the purposes of navigation, or is capable of bearing upon its bosom, at mean low tide, boats loaded with freight in the regular course of trade. The mere rafting of timber thereon, or the passage of small boats thereover, whether for the transportation of persons or freight, shall not be deemed navigation within the meaning of this and the preceding section, and shall not make tidewater navigable. (Acts 1902, p. 108)

85-1309. (3637) Rights of owners of land adjacent-to navigable tidewaters.--For all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tidewaters, as defined in the preceding section, shall extend to low water mark in the bed of the water. Provided, however, that nothing in this and the two preceding sections shall be so construed as to authorize such an exclusive appropriation of any tidewater, navigable or nonnavigable, by any person whomsoever, as to prevent the free use of the same by others, for purposes of passage and for the transportation of such freights as may be capable of being carried thereover. (Acts 1902, p. 108)

85-1310. (3638) Levees and ditches; construction authorized.--All persons owning, or who may hereafter own, lands on any watercourses are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said watercourses: Provided always, that the said ditching and embanking does not divert said watercourse from its ordinary channel;

GEORGIA STATE CONSTITUTION OF 1945

Art. 1, Sec. 6, Par. 1

Tidewater titles: confirmed. The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark is hereby ratified and confirmed.

UNITED STATES, CEDING MARSH LANDS TO.

No. 325.

An Act to grant and cede to the United States Government certain strips of marsh land in Camden county, Georgia, for the purpose of further opening on inland waterway, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same that the Governor of the said State be, and is, hereby authorized and directed to grant unto the United States of America sufficient tracts of marsh land located in Camden County, Georgia, and in 33d District G.M. of said county, of a width in each instance not to exceed six hundred (600) feet and of a length

necessary to connect Little Satilla River with Unbrella Creek and Dover Creek with Bailey's Cut and of such shapes and bounds, courses and distances, and containing such acreage as may be prescribed by the United States engineer officer at Savannah, Georgia, for the purpose of connecting the said waterways by such canals for navigation, and upon certificate filed by the United States engineer officer in charge of the office at Savannah, Georgia, with the said Governor, the Governor shall then issue a grant or grants covering the said tracts of land, and which may be issued in one grant or two grants as may be feasible, and upon the issuance of said grants the jurisdiction of the United States Government is hereby ceded by the State of Georgia over the lands hereby stated.

Sec. 2. Be it further enacted that all laws and parts of laws in conflict with this Act are hereby repealed.

Approved July 29th, 1914.

TITLE 43, U.S.C.
Statue 1311. Rights of the States

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950 entitled thereto under the law.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

Civil Action No. 3092

United States of America, Plaintiff

v.

Herman Diamond, Defendant

C O M P L A I N T

NOW COMES the plaintiff, United States of America, by and through its undersigned counsel, and complaining of the defendant, HERMAN DIAMOND, alleges and says as follows:

1. This Honorable Court has jurisdiction over this cause of action by virtue of the fact that the United States of America is the plaintiff herein (Title 28, United States Code, Section 1345).

2. The defendant is an individual residing and living within the Southern District of Georgia.

3. On April 4, 1973, and at times unknown to the plaintiff, and prior thereto, and continuing through until the present time, the defendant and others acting as agents of said defendant jointly and severally undertook the fill of estuarine marshlands within the navigable waters of the United States in a marsh adjacent to Richardson Creek, Oatland Island, Chatham

County, Georgia; and thereby threw, discharged, deposited, caused to be deposited, procured to be thrown, and suffered to be deposited from the shore, within the navigable waters of the United States, refuse, which includes but is not limited to the following: roots or stumps, broken concrete, construction materials, and dirt, in violation of the provisions of Title 33, United States Code, Section 407; and further, the defendant has created an obstruction to navigation within the navigable waters of the United States, to wit: the estuarine marshlands adjacent to Richardson Creek, Oatland Island, the said obstruction not being affirmatively authorized by Congress and, therefore, prohibited by and in violation of Title 33, United States Code, Section 403.

4. No Department of the Army permit for dumping of fill within the navigable waters of Richardson Creek, Oatland Island, has been issued to the defendant. Defendant has not applied for said permit.

5. Upon information and belief, it is alleged that the defendant has not ceased the said depositing of refuse within the navigable waters of the United States.

6. The said refuse now lying within the estuarine marshlands of the United States is and represents an irreparable damage and harm to the plaintiff and to the people of the United States.

7. The said deposit of refuse within the navigable waters of the United States, if allowed to remain, will further impair and destroy the navigable waters of Richardson Creek, Oatland Island.

8. Unless defendant, HERMAN DIAMOND, and his agents are restrained from further depositing of refuse within the navigable waters of the United States, the same will continue in their efforts to complete the unauthorized land fill operation.

WHEREFORE, the plaintiff prays to the Court:

1. That a permanent Injunction issue to restrain and enjoin the defendant from further depositing or dumping of refuse of any kind within the navigable waters of the United States, particularly in the marshlands of Richardson Creek, Oatland Island, Chatham County, Georgia, the said dumping or depositing of refuse being in direct violation of the laws of the United States; and

2. That an Order issue mandatorily compelling the defendant to remove the said refuse heretofore deposited within the navigable waters of the United States in said area; or

3. In the alternative, that the Court award damages to the plaintiff, both compensatory and punitive, along with the costs of this action, and such other and further relief as the Court may deem just, reasonable, and proper.

# TITLE 15

## BOUNDARIES AND JURISDICTION OF THE STATE OF GEORGIA

15-101. (16) Boundaries of the State.--The boundaries of Georgia as deduced from the Constitution of Georgia, the Convention of Beaufort, the Articles of Cession and Agreement with the United States of America entered into on the 24th of April, 1802, the Resolution of General Assembly of December 8, 1826, and the adjudications and compromises affecting Alabama and Florida, are as follows:

### GEORGIA CESSION

COMMUNICATED TO CONGRESS, APRIL 26, 1802

7th Congress No. 69. 1st Session

ART. II. The United States accept the cession above mentioned, and on the conditions therein expressed: and they cede to the State of Georgia whatever claim, right, or title, they may have to the jurisdiction, or soil of any lands lying within the United States and out of the proper boundaries of any other State, and situated south of the southern boundaries of the States of Tennessee, North Carolina, and South Carolina, and east of the boundary line hereinabove described, as the eastern boundary of the territory ceded by Georgia to the United States.

## CHAPTER 15-2. JURISDICTION OF THE STATE.

15-201. Extent of sovereignty and jurisdiction.--The sovereignty and jurisdiction

of this State extend to all places within the limits of herboundaries, except so far as she has voluntarily ceded the same to the United States or adjacent States over particular localities.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 3092

United States of America, Plaintiff
et, al.

v.

Herman Diamond, Defendant

N O T I C E

TAKE NOTICE that there was entered on the Docket June 9, 1975 an (order) in the above styled case making the judgment of the Fifth Circuit the judgment of this court.